84-1175

No. _____

Office-Supreme Court, U.S.
FILED
JAN 22 1985
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

David Nelson,

Petitioner

v.

The State of Texas

Petition for a Writ of Certiorari to the Court of Criminal Appeals Austin, Texas

---

R. L. Whitehead, Jr.
Whitehead-Beckworth
505 North Green Street
Longview, Texas 75601
(214) 758-0561

Attorney for Petitioner

QUESTION PRESENTED

Whether incarceration in the Texas Department of Corrections under circumstances presently existing constitutes cruel and unusual punishment as proscribed by the Eighth Amendment to the Constitution of the United States and Article 1, Section 13 of the Constitution of the State of Texas.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 2

JURISDICTIONAL STATEMENT 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 4

REASON FOR GRANTING THE WRIT 5

CONCLUSION 11

CERTIFICATE OF SERVICE 12

TABLE OF AUTHORITIES

CASES — PAGE

Estelle v. Gamble
429 U.S. 97
50 L.Ed.2d 251
97 S.Ct. 285 (1976) 6

Holt v. Sarver
309 F.Supp. 362
E.D. Ark., 1970 7

Morales v. Turman
364 F.Supp. 166
ED Tex, 1973 8

Woodhouse v. Virginia
487 F.2d 889
CA 4 Va 10

STATUTES

Title 28 U.S.C.A. § 17.1(c) 2

Title U.S.C.A.Const. Amend. 8 ..... 3, 5, 6

Vernon's Ann.Tex.Const.
Art. 1, § 13 ..... 3, 5, 6

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

David Nelson,

Petitioner

v.

The State of Texas

Petition for a Writ of Certiorari to the Court of Criminal Appeals Austin, Texas

Petitioner, David Nelson, prays that a writ of certiorari issue to review the judgment denying Petitioner's Motion for Rehearing of the Court of Criminal Appeals for the State of Texas entered on November 21, 1984.

OPINION BELOW

The Court of Criminal Appeals for the State of Texas denied Petitioner's Motion for Rehearing without publishing a written opinion.

JURISDICTIONAL STATEMENT

The Court of Criminal Appeals for the State of Texas denied Petitioner's Motion for Rehearing on November 21, 1984. The jurisdiction of this Court is invoked under 28 U.S.C.A. Rule 17.1(c).

STATUTES INVOLVED

1. U.S.C.A.Const. Amend. 8 provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

2. Vernon's Ann.Tex.Const. Art. 1, § 13 provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted....

STATEMENT OF THE CASE

Petitioner was indicted for the offense of murder. After two trials, a jury convicted him of the lesser included offense of voluntary manslaughter and assessed his punishment at five years confinement in the Texas Department of Corrections.

The Court of Appeals for the State of Texas affirmed the decision of the trial Court and thereafter the Court of Criminal Appeals for the State of Texas denied Petitioner's Petition for Discretionary Review and Motion for Rehearing.

The question presented to this Court was raised for the first time in Petitioner's Motion for Rehearing and the state court did not render an opinion.

REASON FOR GRANTING THE WRIT

WHETHER INCARCERATION IN THE TEXAS DEPARTMENT OF CORRECTIONS UNDER CIRCUMSTANCES PRESENTLY EXISTING CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT AS PROSCRIBED BY THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE 1, SECTION 13 OF THE CONSTITUTION OF THE STATE OF TEXAS.

Conditions in the Texas Department of Corrections have recently reached a "near riot" and calamitous state.

The Eighth Amendment of the Bill of Rights and Article 1, Section 13 of the Texas Constitution contain identical language: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

The commentary to Vernon's Ann. Tex.Const., Article 1, Section 13 provides

as follows: "[c]ruel and unusual punishments are those of a barbaric character unknown to the law." The proscription has been held to apply to the severity of the punishment as well as to the conditions of incarceration.

The primary concern of the drafters of the Eighth Amendment was to prohibit torture and other "barbarous" methods of punishment. This concept has been expanded by our courts through the years so that the Amendment now also proscribes disproportionate penalties and also deals with what types of conduct constitute crimes. As stated by Justice Marshall in Estelle v. Gamble, 429 U.S. 97, 50 L.Ed.2d 251, 97 S.Ct. 285 (1976):

> The Amendment embodies broad and idealistic concepts of dignity, civilized standards, humanity and decency...against which we must evaluate penal measures. Thus we have held repugnant to the Eighth Amendment punishments which are incompatible with the evolving standards of decency that mark

> the progress of a maturing society...or which involve the unnecessary and wanton infliction of pain....

In that case, the court held that deliberate indifference to a prisoner's serious illness or injury constitutes cruel and unusual punishment as proscribed by the Eighth Amendment.

In Holt v. Sarver, 309 F.Supp. 362 (E.D. Ark., 1970), the court held that the term "cruel and unusual" is flexible and broadens as society cares more for its members (pp. 380-381). The court stated that the conditions in the prisons of Arkansas were such that they were shocking to the conscience of civilized people, and that the claim could be made, and redress sought, by a prisoner although he had not been subject to the particular harm. The court concluded its opinion on page 385 with the following:

> Let there be no mistake in the matter; the obligation of the Respondent to eliminate existing unconstitutionalities does not depend on what the Legislature may do, or upon what the Governor may do, or indeed upon what Respondent may actually be able to accomplish. If Arkansas is going to operate a penitentiary system, it is going to have to be a system countenanced by the Constitution of the United States.

In Morales v. Turman, 364 F.Supp. 166 (ED Tex, 1973), the court issued an injunction against the Texas Youth Council after finding that wide-spread beating, slapping, kicking and otherwise physical abuse of the inmates at a correctional facility constituted cruel and unusual punishment.

Petitioner requests this Court to take judicial notice of the deplorable and shocking conditions by virtue of wide-spread publicity concerning violence, murders, stabbings, and other assaults which have recently occurred at the Texas Department of Corrections.

Copies of articles which have appeared in the Longview Morning Journal and The Dallas Morning News are included in the Appendix (A1-25) and they are just typical examples of the facts concerning the conditions of prisons and the seeming refusal and/or inability of those in control to rectify the situation.

What are the conditions that constitute cruel and unusual punishment in the Texas Department of Corrections today? A January 10, 1985, article in the Longview Morning Journal (A24) stated that the number of stabbings within the system in 1984 was 395 -- over one stabbing each day in the system. This same article reported 25 inmates were slain -- approximately one every other week. To allow such mass stabbings and murdering surely shocks any standard of decency. Petitioner would show the Court that he is not a violent person and has a wife and children who

will be dependent upon him for support. His record to the time of his arrest for the instant offense is spotless. As the court held in Woodhouse v. Virginia, 487 F.2d 889 (CA 4 Va), if there is a pervasive risk of harm to inmates from other prisoners and the officials are not exercising reasonable care to prevent prisoners from intentionally harming others or from creating a unreasonable risk of harm, then cruel and unusual punishment exists and relief should be granted. Such is the case at the Texas Department of Corrections and this Court is the only vehicle by which Petitioner can invoke his constitutional right to be free from cruel and unusual punishment.

Alternatively, if this Court does not take judicial notice of the conditions in the Texas Department of Corrections at the present time, Petitioner requests the Court to remand the case to a lower Court

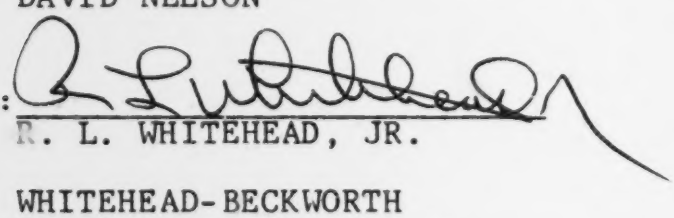
with fact finding capabilities for the purpose of making a factual determination as to the conditions which exist in the Texas Department of Corrections, and whether or not successful remedial measures have been instituted.

CONCLUSION

Conditions in the Texas Department of Corrections are such that it is a deprivation of the constitutional rights of the citizens of the State of Texas and United States of America to confine persons therein. For the reasons stated herein this Court should grant this petition.

Respectfully submitted,

ATTORNEYS FOR PETITIONER
DAVID NELSON

By: 
R. L. WHITEHEAD, JR.

WHITEHEAD-BECKWORTH
505 North Green Street
Longview, Texas 75601
(214) 758-0561

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Petition for a Writ of Certiorari were mailed to the following: Mr. Carter O. Beckworth, District Attorney, Gregg County Courthouse, Longview, Texas; Honorable Robert Huttash, State Prosecuting Attorney, Post Office Box 12405, Austin, Texas 78711; and Solicitor General, Department of Justice, Washington, D.C. 20530 on this 18th day of January, 1985.

R. L. WHITEHEAD, JR.

APPENDIX

Monday, October 14, 1984
Longview Morning Journal

TENNESSEE COLONY (AP) - Mexican American inmates clashed with black prisoners Saturday in violence that left one man dead and seven others injured at the Texas Department of Corrections Coffield Unit, a spokesman said.

The killing was the 19th this year among inmates of the Texas prison system, the nation's second largest.

The eight injured black inmates were stabbed by six Mexican-American inmates about 9:30 a.m. Saturday in what prison officials believe was a racially motivated attack, said TDC spokesman Charles Brown.

Michael Davis, 22, serving a 12-year Bexar County sentence for robbery by threats, robbery by injury, escape and aggravated assault of a police officer, died at Anderson County Memorial Hospital

in Palestine after the early morning assault, Brown said.

Other victims were identified as John Joseph Clark, 24, serving a five-year Tarrant County sentence for aggravated robbery with a deadly weapon, Leon Briscoe, 26, serving an eight-year Jefferson County sentence for burglary and aggravated assault; Roy Sanders, 24, serving a 15-year sentence out of Tarrant County for murder and two counts of attempted murder with a deadly weapon; and Eric Tituef, 22, serving a 15-year Lubbock County sentence for rape.

Clark, Briscoe, Sanders and Tituef were among the more seriously injured, Brown said, and were taken to Anderson County Memorial Hospital.

The three other injured inmates were identified as Milton John Vital, Jr., 22, serving an eight-year Galveston County

sentence for robbery; Michael Daly Mitchel, 30, serving a 20-year sentence out of Tarrant County for burglary of a habitation and aggravated rape of a child; and Matthew Fillmore, 31, serving a 20-year Lubbock County sentence for rape.

Vital and Mitchell were transferred to the hospital at nearby Beto II unit, Brown, said, while Fillmore was treated at the Coffield Unit.

Reports of the prisoners' conditions were not available Saturday afternoon, Brown said.

An official at the hospital, who declined to be identified, refused to provide any information on the inmates' conditions.

"The attack occurred in the B-side dining room, " Brown said, "All the participants were kitchen workers. The suspects pulled homemade weapons and stabbed the eight victims."

Six homemade weapons were found in the dining area, Brown said.

Monday, October 15, 1984
Longview Morning Journal

ROSHARON (AP) - An inmate was found stabbed to death Sunday in a shower at the Texas Department of Corrections Darrington Unit, a prison spokesman said, and five others were found to have minor stab wounds in another area of the same prison unit.

TDC spokesman Phil Guthrie said the body of David Paul Alto, 26, was found with 24 stab wounds not long after a disturbance broke out in the unit's main hallway, where five inmates were found to have minor injuries.

Guthrie said the inmates were confined to their cells and extra prison staff brought in to search for concealed weapons. He said the Brazoria County sheriff's department was investigating the

slaying of Alto, who was serving an eight-year burglary sentence from Harris County.

"We don't know at this time if the two incidents were related," Guthrie said.

Meanwhile, prison officials were interrogating inmates Sunday at the TDC's Coffield Unit at Tennessee Colony to learn what triggered a clash between black and Mexican American inmates that left one prisoner dead and seven others injured on Saturday.

The weekend incidents raised to 20 the number of inmates killed so far this year in Texas prisons.

TDC spokesman Charles Brown said officials at the Coffield Unit were interrogating prisoners Sunday to learn more about what appeared to be a racially motivated clash.

The seven injured and one dead inmates, all black, were attacked by six

Mexican-American inmates in a dining room at the unit, Brown said.

"They (officials at Coffield) have controlled the movement of prisoners in the area where the suspects live," said Brown.

Michael Davis, 22, died at Anderson County Memorial Hospital after receiving "multiple stab wounds to the upper chest" during the 9:30 a.m. attack, Brown said.

Davis had been serving a 12-year Bexar County sentence for aggravated assault on a police officer, robbery by threats, robbery by injury and escape.

Other victims were identified as Leon Briscoe, 26, serving an eight-year Jefferson County sentence for burglary and aggravated assault; John Joseph Clark, 24, serving a five-year sentence for aggravated robbery with a deadly weapon out of Tarrant County; Eric Tituef, 22, serving a 15-year Lubbock County sentence for rape;

and Roy Sanders, 24, serving a 15-year sentence out of Tarrant County for murder and two counts of attempted murder with a deadly weapon.

Monday, October 15, 1984
Longview Morning Journal

TENNESSEE COLONY (AP) - Texas Department of Corrections Lt. Randall McFall has completed his first full week of active duty at a prison much changed since he was stabbed last July by a Coffield inmate wielding a homemade knife.

"Mine (stabbing) was why they did what was done here," McFall said. "They hired the bosses we needed and did the shakedown of the prison."

Changes that McFall returned to find included the addition of about 80 correctional officers to the security staff with the promise of more before the end of the year. A series of subsequent lockdowns reduced the rate of inmate stabbings from 15 a month to zero during the month of September.

However, last weekend saw another eruption of violence at the Coffield Unit that left one inmate dead and seven others injured. TDC spokesman Charles Brown said the Saturday morning attack in a dining room by six Mexican-American inmates against six black prisoners appeared racially motivated.

"This comes as a surprise because we've been doing so well lately as far as violent incidents are concerned," Brown said Sunday. "I don't know what prompted this. I don't know what our next move will be."

The search that followed McFall's July 18 stabbing recovered 489 weapons fashioned and hidden by Coffield inmates. More than 340 of those weapons were crude knives of the kind used on McFall.

TDC Director Raymond K. Procunier's move to identify dangerous inmates and separate them from the rest of the prison

population was the improvement that McFall said won the most immediate approval.

"If you separate the hardened from the less hardened, at least you know where you stand when you go in with them," McFall said.

McFall said that all of the action taken by TDC at Coffield were measures he knew would eventually be instated. Still, he said he was surprised that the changes have been made so quickly after the stabbing that nearly cost his life.

No motive has been established in the attack on the 30-year old McFall, than a sergeant, who was supervising the return of inmates to their cells in a protective wing of the unit. Turning to walk away, McFall was confronted by an inmate who had been standing behind him.

"It all happened so quickly that I don't know how to explain what happened," McFall said. "It was weird."

The homemade knife -- known as a "shank" -- plunged into the 11-year TDC veteran's abdomen before he had time to realize the inmate was armed. A 4-inch deep wound cut across McFall's pancreas, liver and stomach.

He pulled the knife out himself, and ran to the prison infirmary.

Wesley Johnson, 21, serving a 10-year sentence for armed robbery, was indicted for attempted murder by an Anderson County grand jury the following week. Trial was set to begin today.

McFall spent the eight days following the attack at Anderson County Memorial Hospital under heavy sedation. Other than a dim recollection of a handshake, McFall said he remembers very little about Gov. Mark White's visit to his hospital room.

"I don't remember a thing the governor said," McFall said. However, White's concern expressed in two letters

to McFall has "meant a little something to me."

Other boosts to McFall's spirits during his seven-week recovery at Baylor Univeristy Medical Center in Dallas was the announcement of his expected promotion to lieutenant, a letter of commendation for bravery from the TDC and "the pretty nurses."

Although he still faces surgery in November, McFall decided to cut short his convalescence leave and return to work just two weeks out of the hospital.

"I'm not really back at work yet," McFall said. "I'm back here killing time and helping out because I got tired of watching those dull soap operas."

Tuesday, October 16, 1984
Longview Morning Journal

HUNTSVILLE (AP) - A warden and 40 Texas prison employees stormed a prison section early Monday under a hail of tear gas, battling inmates for seven minutes and freeing a guard who was held hostage.

Guard Ronald Willmon, 21, was rescued uninjured shortly after 4 a.m., about an hour after he was captured by a group of prisoners classified as particularly dangerous and troublesome, Warden David Myers said.

Four people -- two guards and two inmates -- were injured, officials said.

The battle came after a weekend of violence that left two inmates dead and 12 others injured in two incidents at Texas prisons. Twenty prison inmates have been killed by other prisoners this year.

The prisoners at the Eastham Unit, 35 miles northeast of Huntsville, escaped early Monday by short-circuiting light sockets in their cells, which shut off electricity to the automatic locks on the doors, prison spokesman Phil Guthrie said.

Myers led the assault and said he intended to storm the section from the first reports of a hostage.

"There was never any doubt in my mind," he said. "They had one of my men."

Guthrie said prison guards could not see into the hall where the prisoners were and could not speak to them.

"Where you don't have direct sight or contact, the thing you do is move, Guthrie said. "You don't wait around."

Prisoners made only one demand, asking for a walkie-talkie, Myers said. He said he gave them one but warned it would not work inside the building.

Myers said the inmates broke into a property room and got boards, pieces of chairs and scissors which they used as weapons.

He said "the whole operation took approximately seven minutes."

Guthrie said the hostage incident began when an inmate warned Willmon there was a problem in the area. The guard went to investigate and was captured, he said.

His captors barricaded the hallway's two doors.

Myers said guards forced a door open a crack and fired in three tear gas cannisters. He said it took "a matter of seconds" to clear away benches and lockers the inmates had used to barricade the doors.

Friday, October 19, 1984
Longview Morning Journal

HOUSTON (AP) - Defense attorneys say violence in the Texas prison system has their clients straining to serve time in county jail -- but Harris County's chief prosecutor says he has little sympathy for the inmates' plight.

Defense lawyer Rachel Capote said two clients in the last two weeks have told her they are afraid to go to a state prison unit. Twenty-one inmates have been killed by other prisoners this year and 317 have been stabbed in the Texas Department of Corrections.

Ms. Capote said one of her clients asked a judge to let him serve 60 days in Harris County Jail before turning him over to state prison officials.

Defendants get credit off their prison terms for time served in county jails.

"He said he really didn't want to go to TDC because they're killing people there," she said.

Ms. Capote said she checks each time an inmate is killed to see if he was one of her clients.

"I'm scared each time I send somebody out," she said.

Ms. Capote said she hates even to strike plea bargains which include prison time because of the danger.

Harris County District Attorney John B. Holmes said he is not concerned by defendants' fears.

"I don't think the penitentiary should be pleasant," he said. "If it adds to a deterrent effect, then maybe they won't commit the crime the next time around."

Attorney Brian Coyne said his clients are also afraid.

"Three or four have asked me to use every type of delay I know so they can get most of their time done here in Harris County," Coyne said. "They're begging for any type of delay."

Tuesday, October 23, 1984
The Dallas Morning News

HUNTSVILLE, Texas - Stabbings at the Eastham Unit and Ellis One Unit increased the number of inmate stabbing in the Texas prison system to 319 this year, a Texas Department of Corrections spokesman said Monday.

Inmate Rickey Gage, 28, was stabbed once in the stomach with a 7-inch knife in the Ellis kitchen at 5:30 p.m. Sunday, said Phil Guthrie, spokesman for the Department of Corrections.

Gage, who is serving a life sentence for theft of property and possession of a firearm in Dallas County, was in fair condition Monday at the TDC hospital in Galveston.

Being held as a suspect is inmate kitchen worker Johnny Cabellero, 37. Cabellero is serving 18 years for carrying

a weapon on a licensed premise, robbery and aggravated assault in Caldwell County.

Guthrie said the stabbing apparently followed an attempt by Gage to get Caballero to steal food and give it to him.

James Scott, 23, was stabbed five times in the neck and back in his cell at the Eastham Unit at 6 p.m. Sunday, Guthrie said. Scott, who is serving a 20-year sentence for escape and burglary of a building in Coleman County, was in fair condition Monday at the TDC hospital.

Being held in prehearing detention as a suspect is Scott's former cellmate, James Lane, 21, serving a 35-year sentence for theft of a vehicle and attempted murder from Taylor County.

Scott was stabbed with a metal spoon that had been sharpened and melted into a plastic cigarette lighter, which was used as a handle, Guthrie said. Officials

believe the stabbing followed a disagreement over commissary items, Guthrie said.

Thursday, January 10, 1985
Longview Morning Journal

ROSHARON (AP) - The Texas Department of Corrections on Wednesday recorded its second inmate slaying of the new year with the fatal stabbing of a 25-year-old prisoner at the Ramsey II Unit in Brazoria County.

Monte Lee Morgan, serving a 13-year term from Dallas County for three counts of aggravated robbery, died of multiple stab wounds to the chest and neck, according to Jim Hinton, chief of the Brazoria County Sheriff's Department.

Jeff Lykins, 36, serving 15 years for various crimes, was identified by prison spokesman Charles Brown as the suspect in the case. Lykins was placed in prehearing detention pending the outcome of an investigation, Brown said.

Last year, 25 inmates were slain -- 23 of them by stabbing, in the most violent year ever recorded in the nation's second largest prison system. Some 395 stabbings were reported. At least four stabbings have occurred so far in 1985.

In Wednesday's incident, officers responding to the sounds of the disturbance saw Lykins with a 4½-inch folding knife in his hand, Hinton said.

"The suspect laid the knife on a table and was removed without incident," Hinton said.

Brown said Morgan told officers at the scene that he had stabbed himself.

"However, we are regarding it as a homicide, pending a complete investigation," Brown said.

The incident occurred in the administrative segregation dayroom about 1:30 a.m. Brown said Morgan died about an hour later.

"Both were in administrative segregation because of a prior history of violence and other disciplinary infractions," he said.

Morgan was stabbed three times in the chest, once in the back and another time the neck, Brown said.

Lykins' convictions included burglary of a habitation in Comal County, theft in Nueces County.